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DATE: February 16, 2009

TO: Mayor and City Council

FROM: Director of Development Services
City Attorney

SUBJECT: Adoption of Interim Moratorium Ordinance and Resolution Prohibiting the Establishment of Medical Marijuana Dispensaries within the City

RECOMMENDATION

That the City Council adopts an interim urgency ordinance approving a moratorium prohibiting the establishment of medical marijuana dispensaries within the City of Hayward and adopting the attached resolution recognizing that marijuana dispensaries are not a permitted use under the City's Zoning Ordinance.

SUMMARY

A moratorium prohibiting the establishment of medical marijuana dispensaries within the City is intended to bridge the gap between the adoption of CY 2010 Council priorities and the possible adoption of actual regulations to implement local medical marijuana dispensaries. If Council directs staff to make this a priority, City staff estimates that the study and development of regulations for dispensaries will likely take six to nine months, including consultation with the Planning Commission for possible zoning changes. Staff will submit a progress report in April 2010.

BACKGROUND

In November 1996, California voters enacted "The Compassionate Use Act of 1996," ("the Act") also known as Proposition 215 and codified in Health & Safety Code section 11362.5 *et seq.* The Act allows a person to cultivate and/or possess marijuana for medical purposes with a doctor's recommendation without violating State law regarding possession and/or cultivation of marijuana.

In October 2003, the State Legislature adopted SB 420, the "Medical Marijuana Program Act" ("MPPA") establishing guidelines for enforcement of the Act. The MPPA sets limits on the amount of marijuana that may be cultivated or possessed, exempts persons engaged in collective and cooperative cultivation of medical marijuana from certain state criminal liability, and authorizes cities to adopt and enforce regulations consistent with State law.

Although the Act has been in effect since 1996, there is still no resolution of the conflict between state and federal law. The manufacture, distribution, or possession of marijuana is a federal

criminal offense pursuant to the Federal Controlled Substances Act, 21 U.S.C. section 801 *et seq.* The Controlled Substances Act may be enforced by federal authorities against persons possessing or using marijuana, regardless of the protections offered by the Act and MPPA.

However, in February 2009 the United States Attorney General announced its intention to ease enforcement of the Controlled Substances Act against medical marijuana dispensaries. Furthermore, in October 2009 the United States Department of Justice issued a memorandum stating that federal resources should not be focused on prosecution of individuals whose actions are in clear and unambiguous compliance with existing state laws providing for medical use of marijuana.

The Act, the MPPA, and the recent announcements from federal prosecutors have created increased interest in the establishment of medical marijuana dispensaries locally and throughout the state. The City of Hayward has received numerous inquiries regarding the establishment of medical marijuana dispensaries within the City.

Despite the fact that medical marijuana dispensaries are not specifically listed as a permitted use under local law and are therefore currently prohibited, City staff recently became aware of a dispensary operating unlawfully within City limits. Following an investigation by the Hayward Police Department confirming the sale of marijuana at the site, the City Attorney's Office issued a cease and desist letter on February 2, 2010, demanding the dispensary cease operation immediately. Although the dispensary agreed to comply with the City's demand, adoption of a moratorium ordinance and a resolution formally recognizing that dispensaries are not a permitted use will strengthen our enforcement capacity against dispensaries that attempt to circumvent local law.

DISCUSSION

The City currently does not have regulations regarding licensing for persons seeking to establish medical marijuana dispensaries. The adoption of a moratorium will give City staff sufficient time to study the issues and to draft possible regulations should they be directed to do so by the City Council. The moratorium will prevent medical marijuana dispensaries from locating in the City until Council determines whether to undertake this policy analysis and provides a direction for the City and, as appropriate, proper procedures and regulations are established.

Government Code section 65858 authorizes a city to adopt an urgency ordinance that prohibits any use that conflicts with a contemplated zoning proposal that the City Council, Planning Commission, or Planning Division is considering or studying or intends to study within a reasonable amount of time to protect the public safety, health, and welfare. The interim urgency ordinance requires a four-fifths vote of the City Council, or six affirmative votes, for adoption and is effective for no more than forty five days. The City Council may further extend the interim urgency ordinance for ten months and fifteen days after a noticed public hearing and may subsequently extend the ordinance for one additional year. Ten days prior to the expiration of the interim urgency ordinance, the City must issue a written report describing the measures taken to alleviate the condition which led to the adoption of the ordinance.

The adoption of a moratorium ordinance is necessary to protect the public safety, health, and welfare. As noted above, the lack of rules or regulations specifically applicable to medical marijuana dispensaries contributed to the establishment of at least one dispensary in the City. This dispensary was issued a Hayward business license because it did not indicate on its business license application that it was a medical marijuana dispensary; the business was described as retail sales. A moratorium would make clear that medical marijuana dispensaries are currently prohibited and will remain so during the period of time the City Council considers possible regulations.

The City's Zoning Ordinance provides that uses that are not expressly permitted are assumed to be prohibited, unless the Planning Director determines that the use is similar to and not more objectionable than the uses permitted under the ordinance. The City's Planning Director has consistently taken the position that medical marijuana dispensaries are more objectionable than the listed permitted uses for the reasons stated in this report. By adopting the attached resolution, the Council will formally ratify the Planning Director's determination.

Staff estimates that it will take six to nine months to study the issues related to medical marijuana dispensaries if so directed by Council to pursue such a study. Therefore, City staff will return to the City Council on March 16, 2010 with a request for an extension of the ordinance.

ENVIRONMENTAL REVIEW

The proposed ordinance and resolution are exempt from environmental review pursuant to Section 15061(b)(3) of the Guidelines implementing the California Environmental Quality Act because the ordinance and resolution will not result in a direct or reasonably foreseeable indirect physical change in the environment.

FISCAL IMPACT

Adoption of the urgency ordinance and resolution will not result in a fiscal impact to the City.

PUBLIC CONTACT

The law does not require notice or a public hearing for adoption of an interim urgency ordinance. An extension to the interim urgency ordinance will require notice and public hearing. City staff will ensure notice is provided to the public concerning the March 16, 2010 request for an extension.

Prepared by: Michael S. Lawson, City Attorney
David Rizk, Director of Development Services

Approved by:



Gregory T. Jones, City Manager

Attachments: Draft Ordinance
Draft Resolution

ORDINANCE NO. _____

AN URGENCY ORDINANCE MAKING FINDINGS AND
ESTABLISHING A 45-DAY MORATORIUM ON THE
ESTABLISHMENT OF MEDICAL MARIJUANA DISPENSARIES IN THE
CITY OF HAYWARD

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF HAYWARD DOES
ORDAIN AS FOLLOWS:

Section 1. Findings. The City Council hereby finds as follows:

- A. In 1996, California voters enacted "The Compassionate Use Act of 1996," ("the Act"), also known as Proposition 215 and codified in Health & Safety Code section 11362.5 *et seq.*
- B. The purpose of the Act was to enable seriously ill persons to obtain, use and cultivate medical marijuana for medical use under limited, specified circumstances.
- C. In 2003, the State Legislature adopted SB 420, the Medical Marijuana Program Act ("MPPA") to clarify the scope of the Act and to allow cities and other governing bodies to adopt and enforce rules and regulations consistent with the MPPA.
- D. As a result of the Act and the MPPA, individuals have established medical marijuana dispensaries in various cities in California.
- E. The City has received numerous inquiries regarding the establishment of medical marijuana dispensaries within the City.
- F. Medical marijuana dispensaries are not specifically listed as a permitted use under the local law and the lack of rules or regulations specifically applicable to dispensaries has lead to the establishment of a dispensary in the City.
- G. The establishment of medical marijuana dispensaries without appropriate regulations and safeguards poses a current and immediate threat to the public peace, health and welfare since such uses could potentially create conflicts with the City's zoning regulations, and could result in an increase in criminal activity, disproportionately taxing the City's police resources.
- H. Government Code section 65858 allows the City to immediately protect and preserve the public peace, health and welfare by prohibiting any use that may be in conflict with a contemplated general plan, specific plan or zoning proposal that the legislative body, planning commission or planning department is considering.

- I. City staff requires time to evaluate the relevant issues and develop guidance for legally appropriate regulation or prohibition of medical marijuana dispensaries.
- J. There is no feasible alternative to satisfactorily study the potential impacts identified above as well or better than the adoption of this interim urgency ordinance.
- K. The adoption of this ordinance does not require review under the California Environmental Quality Act ("CEQA") pursuant to Section 15061(b)(3) of the Guidelines implementing CEQA because the ordinance will not result in a direct or reasonably foreseeable indirect physical change in the environment

Section 2. "Medical Marijuana Dispensary" Defined. For purpose of this interim urgency ordinance:

- A. "Medical marijuana dispensary" means (1) any facility, building, structure or location, whether fixed or mobile, where a primary caregiver makes available, sells, transmits, gives or otherwise provides medical marijuana to two or more of the following: a qualified patient or a person with an identification card, or a primary caregiver in strict accordance with California Health and Safety Code Section 11362.5 *et seq.*; or (2) any facility, building, structure or location, whether fixed or mobile, where qualified patients and/or persons with identification cards and/or primary caregivers meet or congregate to cultivate or distribute marijuana for medical purposes.
- B. The terms "primary caregiver," "qualified patient," and "person with an identification card" shall be as defined in California Health and Safety Code Section 11362.7. "Medical Marijuana Dispensary" shall include medical marijuana collectives and cooperatives, as those terms are described in Health and Safety Code Section 11362.775 and the California Attorney General's Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use, published in August, 2008.

Section 3. Imposition of Moratorium. For the period of this interim urgency ordinance, or any extension thereof, a medical marijuana dispensary shall not be established, operated or maintained at any location within the City, even if located within an otherwise permitted use. No permits or authorizations for a medical marijuana dispensary shall issue while this ordinance is in effect.

Section 4. Adoption; Urgency Statement. This ordinance is an interim ordinance, adopted as an urgency measure pursuant to Government Code section 65858 and is for the immediate and long-term preservation of the public peace, health, and welfare. The following facts constitute an urgency: In the years since the passage of the Act, City staff have received numerous inquiries regarding the establishment of medical marijuana dispensaries within City limits. In addition, despite the fact that dispensaries are prohibited uses under the City's Zoning Ordinance, several illegal dispensaries have operated in the past, and there is a dispensary currently operating illegally in the City. Though the California Attorney General has established guidelines for the legal operation of medical marijuana dispensaries, and local jurisdictions are authorized to

approve medical marijuana dispensaries that meet certain criteria, jurisdictions in which dispensaries have been approved have reported illegal activity at or near these dispensaries, including robbery, homicide and street sales of marijuana outside of a dispensary. During the time that the City allowed the operation of a limited number of medical marijuana dispensaries, the Hayward Police Department reported numerous burglaries, armed robberies, attempted armed robberies and at least one homicide, each of which occurred at the dispensary itself or was related to the operation of the dispensary. The City must have adequate opportunity to consider regulations for the operation of medical marijuana dispensaries to ensure that public health, safety and welfare are not adversely impacted by permitting medical marijuana dispensaries to operate lawfully within the City.

Section 5. Report. The City Attorney or his designees shall review and consider options for regulation of medical marijuana dispensaries in the City to provide the City Council a written report describing the measures which the City has taken to address the conditions which led to the adoption of this interim urgency ordinance.

Section 6. CEQA Compliance. This interim urgency ordinance is exempt from environmental review pursuant to Section 15061(b)(3) of the Guidelines implementing the California Environmental Quality Act because the ordinance will not result in a direct or reasonably foreseeable indirect physical change in the environment.

Section 7. Constitutionality. If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portions of this ordinance.

Section 8. Publication. This interim urgency ordinance or a comprehensive summary thereof shall be published in newspaper of general circulation of the City within fifteen (15) days after its adoption.

Section 9. Effective Date. This interim urgency ordinance shall take effect immediately upon its adoption by a four-fifths (4/5) vote of the City Council. This ordinance shall continue in effect for forty-five (45) days from the date of its adoption and shall thereafter be of no further force and effect unless extended by the City Council as provided for in Government Code section 65858.

INTRODUCED at a regular meeting of the City Council of the City of Hayward, held the _____ day of _____, 2010, by _____.

ADOPTED at a regular meeting of the City Council of the City of Hayward held the _____ day of _____, 2010, by the following votes of members of said City Council.

AYES: COUNCIL MEMBERS:
MAYOR:

NOES: COUNCIL MEMBERS:

ABSTAIN: COUNCIL MEMBERS:

ABSENT: COUNCIL MEMBERS:

APPROVED:
Mayor of the City of Hayward

DATE:

ATTEST:
City Clerk of the City of Hayward

APPROVED AS TO FORM:

City Attorney of the City of Hayward

RESOLUTION NO.

RESOLUTION PROVIDING THAT MEDICAL MARIJUANA DISPENSARIES ARE AN EXCLUDED USE UNDER THE CITY'S ZONING ORDINANCE

WHEREAS, in 2003, the State Legislature adopted SB 420, the Medical Marijuana Program Act (the “MMPA”), allowing cities and other local agencies to adopt and enforce rules and regulations consistent with the MMPA; and

WHEREAS, the City's Zoning Ordinance provides that uses that are not expressly permitted are assumed to be prohibited unless the Planning Director determines that the use is similar to and not more objectionable than the uses permitted under the ordinance, and the Planning Director has consistently taken the position that medical marijuana dispensaries are more objectionable than any use permitted under the ordinance.

NOW THEREFORE BE IT RESOLVED, that the City Council of the City of Hayward hereby ratifies the Planning Director's determination that medical marijuana dispensaries are more objectionable than other uses and, as such, are not permitted under the City's Zoning Ordinance.

BE IT FURTHER RESOLVED, that any dispensary found to have been operating without a local permit may be precluded from obtaining a permit should regulations be developed in the future allowing the operation of medical marijuana dispensaries in the City.

IN COUNCIL, HAYWARD, CALIFORNIA _____, 2010

ADOPTED BY THE FOLLOWING VOTE:

AYES: COUNCIL MEMBERS:
MAYOR:

NOES: COUNCIL MEMBERS:

ABSTAIN: COUNCIL MEMBERS:

ABSENT: COUNCIL MEMBERS:

ATTEST:
City Clerk of the City of Hayward

APPROVED AS TO FORM:

City Attorney of the City of Hayward